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Barbara Uzelac v. Joseph Uzelac, Jr. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

IN THE MATTER OF THE ESTATE OF LOUIS J. UZELAC, Deceased. BARBARA UZELAC, Appellant, vs. JOSEPH UZELAC, JR., Personal Representative of the Estate, Appellee.	Appellate Case No. 20060858-CA Trial Court Case No. 993901690 Trial Judge Leon A. Dever

REPLY BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT

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I. THE CHILDREN ATTEMPT TO PREJUDICE THE COURT AGAINST BARBARA.

Susan Brooke Mageras and Allyson Drew Uzelac (the "Children") have cited numerous facts and misstatements of facts[1] in their brief that have no relevance to the issues before the Court. Among other allegations, the Children cite out of context: (i) unrelated proceedings below, ultimately falsely claiming that Barbara B. Uzelac ("Barbara") lost all of those matters; (ii) the number of attorneys that have appeared for Barbara in this matter; (iii) that Barbara was sanctioned; (iv) how Louis and Barbara handled their finances during their marriage; (v) Barbara's win/loss record on her first appeal (inaccurately); and (vi) without citation to record evidence, the amount the estate allegedly paid defending Barbara's claims (more than $200,000.00). "Brief of Intervenors/Cross Appellants" ("Children's Brief") at 7-9, 27-30, 27 Fn.18, 30, Fn.20. From these and similar allegations, the Children argue that Barbara "forced" the estate to pay these legal fees. *Id.* at 30. They allege that Barbara is trying "to reach back four (4) years and into her deceased husband's premarital property to pay a devise she could have received in 1999." *Id.* at 12. There is no evidence that Barbara was offered any

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[1] *See, e.g.*, Children's Brief at 15 (Claiming Barbara asserted her status as a creditor for the first five years of the litigation); *compare* T. 1, 12, 130 (Personal representative's counsel stated, in the presence of the Children and their counsel and without correction or objection: "The facts will show that the idea of [Barbara] being a creditor was raised for the first time three months ago, in July of 2003; two-and-a-half years too late").

settlement, much less $230,660.90, in 1999.[2] In the final analysis, the Children have made no argument that directly uses these and similar allegations in support of the legal principles involved in this appeal.

In their "(Errata) Intervenors' Brief on Remand" (the "Children's Remand Brief"), the Children called Barbara "the proverbial raccoon with her hand in the cookie jar." *Id.* at 10; R.1588. Irrelevant, pejorative, personal attacks have no place in arguments before this Court. Nonetheless, those attacks have been made.

Accordingly, Barbara responds: (i) She knew Louis for twenty-eight years before their marriage; (ii) During that twenty-eight-year period, she was a good friend of Louis' first wife through their twice monthly bridge club meetings; (iii) Through the bridge club's annual Christmas parties and other socials, she and Louis became friends; (iv) After their respective spouses died in the early 1970's, Louis and Barbara were married in April 1976; (v) Barbara and Louis were happily married for more than twenty-three years until Louis' death in November 1999; and (vi) the Children have received both their devise and Barbara's in 2003. R.1413; October 7, 2003 Trial Transcript at 18-21 (hereafter "T."); Trial Exh. 2 at 1; Trial Exhibit 21.

Barbara has pursued this litigation because Louis wanted her to receive $230,660.90 upon his death, Barbara did not receive it, and Barbara wants and needs this

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[2] The Children's calculation of the amount of cash available to pay Barbara, even after the sale of the adjacent lot, was less than Barbara's devise *unless* the homestead had been sold. *Id.* at 26-27.

money. The personal representative (Louis' brother and uncle of the Children, T. 110) and now the Children have fought ever issue with tenacity to deprive Barbara of the benefits Louis intended for her. Indeed, allegedly spending over $200,000 to fight a devisee is tenacious, improvident, and a breach of the personal representative's duty of loyalty and impartiality. Utah Code §75-3-703; §75-7-802; §75-7-803.

Barbara will be eighty-one years old on July 17. T. at 91. By the time this matter is remanded to the lower court, she will have lost approximately eight years of a more peaceful and comfortable life. Even in victory, Barbara is already a loser. Barbara asks the Court not to be swayed by the Children's emotional appeal; she is not, and never has been, a "raccoon with her hand in the cookie jar."

II. BARBARA IS A GENERAL PECUNIARY DEVISEE.

A. Whether Barbara Did or Did Not Receive a General Devise Chargeable to Specific Property Is Irrelevant; The Issue Remains: Was the Devise Pecuniary?

In responding to Barbara's arguments that she is a general pecuniary devisee, the Children do not address the substance of Barbara's analysis. Brief of Appellant ("Barbara's Brief") at 17-19. Instead, they claim for the *first time* on appeal[3] that Barbara's devise is "a general devise chargeable to specific property." Children's Brief at 13-15; *compare* Children's Remand Brief at 7-9, R.1585-87. But even had the Children

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[3] Determining whether or not the Children raised their issues on appeal with the lower court required a careful review of their Remand Brief, because the Children never cite to the Record showing where their issues had been preserved for appeal.

raised this issue on remand, the Children's analysis does not affect the issue of whether Barbara's devise is a general pecuniary devise or a general devise. Assuming Barbara's devise was a general devise chargeable to specific property, since the property identified by the Children as the designated source of the devise is no longer available to pay Barbara, the devise would be treated as a general devise in any event. Utah Code §75-3-902(1) (text following (1)(d)). Even under the Children's interpretation, the issue remains: is Barbara's devise a general *pecuniary* devise? A general devise chargeable to specific property can be a general pecuniary devise if the property has been lost or dissipated. For example, Comment c to the Restatement identifies a devise of "$1,000 payable from my bank account" as a general devise charged to specific property. *See* Restatement (Third) of Property (Wills & Don. Trans.) § 5.1 (1999), Comment c. If the bank account were closed at the decedent's death, the devisee receives a general *pecuniary* devise.

To resolve whether or not Barbara is a general pecuniary devisee does not require a contorted analysis of the Antenuptial Agreement and the Will. Children's Brief at 13-16, 28-30. It does not require the Court to add words to the Antenuptial Agreement or the Will. *Id.* Rather the issue is: What is the result of *Louis' decision* to incorporate by reference the Antenuptial Agreement into his Will? Trial Exh. 4 at 1; Utah Code §75-2-510. If, as a result of Louis' decision to incorporate the Antenuptial Agreement into his will, Barbara receives a specific amount of money, then Louis' decision makes Barbara a

general pecuniary devisee. Even the Children would have to agree that $230,660.90 is a pecuniary amount. Children's Brief at 14. That is precisely what has happened here and that is why Barbara is a general pecuniary devisee.

B. The Calculation of Barbara's Devise after Louis' Date of Death Does Not Change the Character of the General Pecuniary Devise.

The Children also claim: "Obviously, interest is not properly assessed on monetary devises if the amount cannot be ascertained until the net probate estate is determined and all claims are paid." *Id.* Were this true, it would be a shock to estate planners who use "pecuniary formula" provisions in wills and trusts to maximize estate tax savings. *See generally,* Richard V. Covey, "The Marital Deduction and the Use of Formula Provisions," Bobbs-Merrill (2nd Ed. 1978).[4] The "pecuniary formula" computes the pecuniary amount based upon laws, facts, and circumstances in existence at the time of the decedent's death. Because the calculation is generally made as part of the preparation of the estate tax return, it usually takes from six to fifteen months before the pecuniary amount is set.[5] Nonetheless, these pecuniary formulas are general pecuniary devises. As stated in the Comment to the Restatement:

> A pecuniary devise can state a sum of money or state a formula from which a sum of money is derived. A pecuniary amount derived by formula is often

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[4] In 1978, Mr. Covey referred to pecuniary formula provisions as "true legacies." *See Id.* at 20-23.

[5] Six months is the final date for calculating values based on the alternate valuation date. 26 U.S.C.A. § 2032(a)(2). With one six month extension, fifteen months is normally the cut off date for filing the estate tax return. 26 U.S.C.A. § 6075(a).

> used in tax clauses, such as a devise of "the smallest pecuniary amount that, if allowed as a federal estate tax marital deduction, would result in the least possible federal estate tax being payable by reason of my death," or a devise of "the largest pecuniary amount, if any, that will not increase the federal estate taxes payable by reason of my death."

Restatement (Third) of Property (Wills & Don. Trans.) § 5.1 (1999), Comment c. Thus, the calculation of Barbara's devise post death does not affect its status as a general pecuniary devise.

C. Louis' Overall Purposes Show Barbara is a General Pecuniary Devisee.

With regard to the beneficiary status of Barbara and the Children, both parties agree it "is a question of construction, on which the testator's overall purpose is relevant." *Id.*, Comment g; Children's Brief at 15. The Children acknowledge that Louis intended Barbara to be a beneficiary of his Will, notwithstanding that he left to his Children "all of my property real, personal or mixed, share and share alike." Children's Brief at 29. However, in arguing that Louis did not intend Barbara to receive a general pecuniary devise, the Children inaccurately claim that Barbara "contracted away" her right to Louis' premarital property. In addition, they violate a fundamental principle of the law governing the interpretation of contracts and wills; they add words to the Antenuptial Agreement and the Will.

1. As a Devisee, Barbara is Entitled to Payment from Louis' Estate.

The Children argue: "Barbara contracted her right to Louis' premarital property away in 1976." Children's Brief at 15. This claim permeates their Brief. *See Id.* at 12,

16, 18, 28-30. However, this claim is inaccurate, because Barbara is seeking her share *as a devisee of Louis' Will.* Paragraph one of the Antenuptial Agreement states:

> In the event of the termination of this marriage by death or otherwise all of the real, personal or mixed property owned by each party hereto prior to the marriage shall be the sole and separate property of him and her or their respective estates.

Trial Exh. 1 at 2, ¶1. When Louis died, his premarital property became part of his estate, exactly as required by the agreement. As a general pecuniary devisee (or a general devisee), Barbara has a claim to payment of her devise from the estate's assets, whether premarital or post marital. Utah Code §75-3-902(1). Nothing in the Antenuptial Agreement precludes Barbara's devise from being paid by premarital property from Louis' estate.[6]

2. The Children Ask the Court to Change the Meaning of the Agreement by Adding the Word "Marital" to Paragraph 5.

The Children argue that the devise to Barbara "per the terms of paragraph 5" of the Antenuptial Agreement was a devise of "marital property." *Id.* at 13-16, 28-30. The Children's methodology mimics what the trial court did in its first decision. *In re Estate of Uzelac,* ¶¶15-21, No. 20040356-CA, 114 P.3d 1164, 526 Utah Adv. Rep. 33, 2005 UT App 234 (Utah App. 2005) (reversing trial court's addition of the word "together" after "all property . . . acquired by the parties"). Children's Brief at 28-30.

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[6] The trial court stated: "neither party had a claim to the other's pre-marital property." R.1750, ¶1. Barbara is not claiming against Louis' pre-marital property.

This is the first time the Children have alleged that paragraph five of the Antenuptial Agreement refers only to "marital property." *See* Children's Remand Brief at 1-11, R.1579-89. The Children want to limit the meaning of "all property . . . acquired" by adding the word "marital" before "property." The trial court attempted to limit the meaning of this phrase by adding the word "together" after "acquired." In the Court of Appeals decision, the trial court's addition of "together" was reversed because "all property . . . acquired by the parties" would include property of every type that could be acquired however acquired. *Uzelac, supra,* ¶ 19. Had Louis or Barbara inherited assets during the marriage, that property would have fallen within "all property . . . acquired" during the marriage, even though under divorce law, inheritances are normally treated as "separate" property. *Hall v. Hall,* 858 P.2d 1018, 1023 (Utah App. 1993). Moreover, it is a cardinal principle of contract interpretation in Utah, that courts do not "add, ignore, or discard words in this process [of interpretation]." *Mark Steel Corp. v. Eimco Corp.,* 548 P.2d 892, 894 (Utah 1976). Thus, the property described in paragraph five of the Antenuptial Agreement included all property of every kind, whether marital or separate.

3. The Children Want to Change the meaning of the Will by Adding the Word "Separate."

A devise of "all my property, real, mixed or personal" has been used for centuries to show the testator is leaving every property of every kind to the designated beneficiary. *See e.g. Estate of Ashton v. Ashton,* 804 P.2d 540, 541-43 (Utah App. 1990) (interpreting similar language to constitute a devise of the "entire estate . . . in fee simple"). It is not,

as the Children claim, a devise of only Louis' separate property. That result can only be reached by adding the word "separate" before property, and that is not permitted in Utah. *Auerbach v. Samuels*, 9 Utah 2d 261, 266, 342 P.2d 879, 882 (Utah 1959) (requiring an unambiguous will to be interpreted from its "four corners").

Louis' choice of words in his Will discloses his overall purpose. Louis is presumed to have known the law and its effects on his Will and Codicil at the time he executed them. *Wallich v. Wallich,* 10 Utah 2d 192, 195, 350 P.2d 614, 616 (Utah 1960) (in interpreting a will, the Court presumed the testator knew the provisions of the anti-lapse statute and how it would impact his will.) Both the Will and the Codicil were prepared after the adoption of the Utah Uniform Probate Code in Utah in 1977. Thus, Louis is presumed to know that Barbara was entitled to be a creditor of the estate who would receive payment prior to any payment to any other beneficiary. Utah Code §75-3-805(1) (1977) and §75-3-807(1977). In preparing his Will, Louis chose language that supports this conclusion. To the Children he stated: "I give, devise and bequeath . . . to my children . . . all of my property, real, mixed, and personal." Trial Exh. 4 at 1. But, to Barbara, he stated: "she is to receive per the terms of our anti [sic] nuptial agreement dated March 26, 1976 . . .." *Id.* In addition, Louis is further presumed to know that if his personal representative delayed payment to Barbara beyond the statutory time limit, then Barbara would be entitled to interest at the legal rate on the amount to which she was

entitled that was not paid. Utah Code §75-3-806(4) (1977).[7] Finding that Barbara is a general pecuniary devisee, entitled to interest at the legal rate, is consistent with Louis' presumed and actual intent. The only distinction between (i) Barbara's status as a general pecuniary devisee and (ii) what her status would have been as a creditor is the date interest payments begin. *Compare* Utah Code §75-3-806(4) (creditor claim) (1992) *with* §75-3-904 (general pecuniary devisee).

Interest at the legal rate is granted because the person entitled to the payment has had to wait to receive payment. Barbara has waited close to seven and a half years to receive any payment, and will likely have to wait for another six to twelve months before she receives payment. Where the amount payable under Louis' will is a dollar amount, it is fair, reasonable, and legally correct to rule that Barbara is a general pecuniary devisee entitled to interest at the legal rate from December 7, 2000 "until payment" is made. Utah Code §75-3-904.

III. THE CHILDREN ARE RESIDUARY BENEFICIARIES.

Like Barbara's status as a beneficiary, Barbara and the Children agree that Louis' overall purpose is relevant to the beneficiary status of the Children, but they again disagree on what that purpose was. Whether the Children are residuary devisees or general devisees affects abatement; if the Children are residuary devisees only their devise will

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[7] In 1977, the statutory time limit was three months following the end of the publication notice period. In 1992, Section 75-3-806(4) was amended so that the statutory period ends six months following death. *See* Laws 1992, c. 179, § 8.

abate to pay Barbara's devise; if they are general devisees, Barbara's devise and the Children's devise will abate to pay Barbara's devise. Utah Code §75-3-902(1).

The Children chose not to respond to Barbara's analysis with regard to what would happen if there were no residuary devisee and a devise were to lapse. Barbara's Brief at 21-22. Because Louis is presumed to know the law, *Wallich,* 10 Utah 2d at 195, 350 P.2d at 616, he logically intended his devise of "all of my property" to act as residuary devise, exactly as the personal representative acknowledged in his Post Trial Brief. *See* Barbara's Brief at 20-21. Otherwise, Barbara could have received lapsed devises as Louis' sole heir up to $50,000 and as a joint heir thereafter. Barbara's Brief at 21-22. Barbara inheriting assets not distributed in Louis' will is contrary to the words Louis actually used in his Will. Trial Exh. 4 at 1. Similarly, Louis intent regarding Barbara's rights, that they precede any other beneficiary, also supports this analysis. *See* discussion *supra* at 7-10.

In contrast, the Children rely on Comment c to Section 5.1 of the Restatement (Third) of Property. *Id.* at 15. Barbara has previously addressed this issue. Barbara' Brief at 19-23.

As noted, the Children need the Court to rewrite paragraph five of the Antenuptial Agreement (adding the word "marital") and to rewrite Louis' Will (adding the word "separate"). Children's Brief at 15, 28-30. While the meaning of the Antenuptial Agreement is relevant, it is Louis' overall purpose *in his Will* in incorporating the Antenuptial Agreement by reference that controls. The Children have not provided any

logical reason that Louis' overall purpose was to treat them as general devisees, while Barbara's analysis has established that Louis intended his children, as the recipients of "all my property," to be *Louis'* residuary devisees. Thus, the Court should reverse the trial court's legal conclusion that the devise to the Children is a general devise.

IV. THE COURT SHOULD ORDER THE HOMESTEAD PROPERTY RETURNED TO THE ESTATE.

Barbara attaches the current property tax report for the two parcels that comprise the homestead. *See* www.assessor.slco.org (Salt Lake County Assessor) for two parcels with tax identification number 2215103005 and 2215103006; Trial Exh. 21 (Deed of Distribution, showing tax identification numbers for the two parcels comprising the homestead). Barbara attaches a copy of each report as Exhibit A to this Brief.

These two parcels have a property value of $961,330 for the land, and $193,370 for the home and other structures. Thus, the total property tax value of the property that Barbara wants to recover and sell to pay her devise is $1,154,700.

The Children assert four legal theories for affirming the trial court's decision to refuse recovery of the homestead. None of those theories challenge Barbara's analysis directly. Instead, the Children claim first that Barbara's possessory interest in the homestead precludes a sale of the homestead to pay Barbara's devise. *Id.* at 18-19. Second, they assert that Barbara's original appeal of the September 27, 2003 Minute Entry was untimely. *Id.* at 19-24. Next, they argue that any motion that Barbara would file now is time barred. *Id.* at 24-25. Finally, they argue that the trial court did not have *in*

personam jurisdiction over the Children at the time of the Court's decision on the September 27, 2003. *Id.* at 26-27. None of these arguments have merit.

The trial court ruled that Barbara's motion was procedurally defective because: (i) it was not a "proceeding" against the Children; and (ii) Barbara's identification of herself as a creditor rather than a devisee did not give the Children notice of Barbara's claim that she wanted the property returned. Trial court's Findings of Fact and Conclusions of Law at 6, ¶6; R.1755.

The trial court's reasons and the Children's arguments are logically barred by the prior appeal. Barbara specifically appealed the September 27, 2003 Order (R.1366-67), and the Court of Appeals, *after* having determined that Barbara could not proceed as a creditor, nonetheless vacated and remanded to the trial court with directions to reconsider Barbara's motion after the trial court determined the amount to which Barbara was entitled as a devisee under Louis' Will. *Uzelac, supra* at ¶¶20-21. The trial court and Children find Barbara's motion defective, when the Court of Appeals impliedly found it was not.

While the Children did not need to intervene in these proceedings,[8] their intervention does highlight one crucial point: As intervenors, the Children must take the case as they find it at the time of intervention. *Lima v. Chambers*, 657 P.2d 279, 285

[8] They that had already participated in their capacity as "interested persons" in different matters without intervention. R. 874-75; R.1243-1255. Utah Code §75-3-105.

(Utah 1982). Thus, any claim that was or could have been resolved in the first appeal may not be raised by the Children now.

A. Barbara's Possessory Interest Can Be Reclaimed at Any Time.

Under Utah law, the property devised to a devisee "devolves" to the devisee immediately upon the decedent's death, but it does so *"subject to administration."* Utah Code §75-3-701; *Matter of Estate of Wagley*, 760 P.2d 316, 317 (Utah 1988). The effect of this provision is that there is no immediate possessory interest in any beneficiary, and beneficiaries have only a limited right to keep possession of estate assets that are in their possession at the time of the decedent's death. Utah Code §75-3-708. Under Section 75-3-708, if the personal representative demands return of estate property in the possession of a beneficiary, it is "conclusively presumed" the personal representative needs the property "for purposes of administration." *Id.* The beneficiary must return the property.[9] Were this not so, there would often be no way to pay creditors of the estate or handle abatement issues that can arise.[10] Thus, while the personal representative is directed generally to

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[9] The Children also assert that Barbara obtained her life estate as a result of the trial Court's order in December 2001. R.138-41. The Court did not order the life estate distributed to Barbara. It simply declared her interest was a determinable life estate and it itemized her responsibilities as a life tenant *in possession of the estate property*. *See also* Utah Code §75-3-708 (duties of personal representative to maintain estate property only *when* the personal representative has possession).

[10] There is always abatement to some extent. Any expenses paid will deprive the beneficiaries of the assets used to pay those expenses. A general devise will cause a residuary devise to abate. Utah Code §75-3-902(1). Because these charges normally fall on the residuary taker(s), the abatement generally goes unnoticed.

make distributions in kind, those distributions are made only "to the extent possible." Utah Code §75-3-906(1). In addition, the Code grants the personal representative the specific power to sell assets of the estate, a power that would be meaningless under the Children's view of Utah probate law. Utah Code §75-3-714(6).

1. Bob Jones' Property Would be Sold.

Contrary to the Children's conclusion, their "Bob Jones" example would lead to the sale of the property in which Bob Jones had a life estate. Children's Brief at 19. If the will had a general devise to another devisee ("D") charged to specific property, if the specific property has been lost or dissipated, if there is only one parcel of property in the estate (with Bob Jones' life estate), and if D requests that the property be sold to pay D's devise, a prudent personal representative would sell the property because the personal representative has a duty to follow the provisions of the probate code, has a duty of loyalty and impartiality to the devisees, and cannot favor one devisee over another. Utah Code §75-3-703; §75-7-802; §75-7-803.[11]

As explained below, the prudent personal representative in selling the property would respect Bob Jones' rights as the life tenant. However, when the personal representative discovers that the devise to D cannot otherwise be paid, the Personal

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[11] In the "Bob Jones" example, the Children did not discuss how the remainder interests devolved to them. The remainder (R) cannot receive the property through a specific devise. In that event both Bob Jones' life estate and R's remainder interest would be specific devises and those would not abate. Utah Code §75-3-902(1)(d).

Representative proceeds to take whatever steps are necessary to sell the property. Utah Code §75-3-703; §75-7-802; §75-7-803; §75-3-714(6).

2. What Happens when Bob Jones is Not in Possession.

If Bob Jones is not in possession of the property, and if no deed of distribution has been executed, the personal representative would sell the property. The personal representative would pay the *value* of the life estate to the life tenant without reduction because the life tenant is a specific devisee. *See* Barbara's Damage Memorandum on remand at 15-17; R.1638-40 (explaining how this is done using methodology developed by the Internal Revenue Service). The balance of the sales proceeds would be used to pay D's general devise and then R's interest. Abatement of D's devise would be handled according to the provisions of Section 75-3-902 as required under the circumstances. Utah Code §75-3-902(1).

3. What Happens if Bob Jones Is In Possession.

If Bob Jones were in possession of the property, the personal representative would request that possession be returned to the estate. As noted above, Bob Jones must comply. Utah Code §75-3-708. If he complies, the personal representative would then proceed to sell the property as provided above. If Bob Jones refused to return possession to the personal representative, the personal representative would move the probate court to order Bob Jones to deliver possession to the personal representative, and the probate court would

do so. *Id.* Once Bob Jones had transferred possession, the personal representative would proceed as outlined above.

4. What Happens if the Property Has Been Distributed.

If a deed of distribution had been executed in favor of Bob Jones and R, the personal representative would recover the property using the powers granted in Sections 75-3-105, 75-3-909, and 75-3-1004. Once recovered, the personal representative would proceed as outlined above.

5. Conclusion

What the Children ask the Court to do is contort probate law so that Barbara alone will be denied any benefit from her devise. In their view, the personal representative may fight one devisee for the benefit of another, favored devisee, use the non-favored devisee's devise to fund the fight, and then advise the non-favored devisee, "we had to use your devise to pay for the litigation against you." That position is not only unjust, it is also contrary to the personal representative's duty to administer a probated will according to its terms *and* "in accordance with the provisions of the probate code." Utah Code §75-3-703(1). Accordingly, the Court should reject the Children's argument.

B. Barbara Is Not Barred from Recovery of the Distributed Property by Either Section 75-3-412 or by this Court's Decision in *Matter of Estate of Morrison.*

The Children argue that an adjudication of any separate probate proceeding is a final order for purposes of appeal, relying upon Section 75-3-412 of the probate code.

Children's Brief at 20-22. However, Section 75-3-412 only applies to "a formal testacy order *under this part* . . .." Utah Code §75-3-412 (emphasis added). Part 4 of Chapter 3, comprising Sections 75-3-401 through 75-3-414, applies to "Formal Testacy and Appointment Proceedings." Utah Code, Title 75, Chapter 3, Part 4. None of the orders entered that are in dispute were entered under the provisions of Part 4. Barbara has never contested Louis' will; rather, she relies on it for her relief in this matter.

Beyond this, the Children argue that the September 27, 2003 minute entry was a final appealable order relying on this Court's decision in *Estate of Morrison,* 933 P.2d 1015, 1017-18, 311 Utah Adv. Rep. 49 (Utah App. 1997). In *Morrison*, this Court stated that Utah Courts have adopted a "pragmatic, case-by-case approach to [determining] finality in probate matters." *Id.* at 1017-18. Under this rule, Utah appellate courts will treat certain non-final, interim probate court orders as final for appellate purposes, *if* the matter is of "vital importance," "removed a cloud of uncertainty," or "effectively end[ed the case absent an appeal]." *Id.* at 1017. This rule makes sense when the issue before the Court is whether or not to accept for appeal a non-final order[12] based on the "case by case" approach. If the Court decides the case does not have one of these factors, the appeal is dismissed and the parties continue the case below.

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[12] If the appealed order were truly a final order, it would be appealable regardless of its importance, etc.

But the Children's proposal to use the "deemed final" approach *to bar* appeals of interim orders as part of an appeal of a final order would be exceptionally unfair and unworkable. To use a "case by case" approach to *deny* appeals of interim orders *as part of* an appeal of a final order would make probate appeals dangerous and unjust. This case is illustrative. Ten days prior to the trial in this matter, the trial court entered a signed *minute entry* that the Children believe falls within the *Morrison* criteria. To deny the right of appeal based on the appellate court's later conclusion that the interim order had "vital importance," created "clouds of uncertainty," etc. would be unfair and unjust. Here, the Court would be denying an appeal of an interim order the trial court titled: "Minute Entry" entered ten days prior to trial.

Moreover, the Children's proposal would create an administrative nightmare. Conscientious attorneys in probate cases, aware of the risk of being second guessed as the importance, etc. of an interim order, would file an appeal for each adverse interim decision. Since there in no procedure for a "notice of intent to appeal" as used in the past, *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1039 Fn.4 (Utah 1989) (discussing former Rule 72(a) of the URCP), each appeal would be treated as an appeal until such time as the reviewing appellate court decided the order would not be deemed final. Absent a summary disposition, a decision to dismiss the appeal would happen after briefing and probably after oral argument.

For these reasons, the Children's argument is unjust and impracticable, and it should be rejected.[13]

C. Barbara is Not Seeking to File a New Motion; the Motion she did File is Timely.

The Children misstate Barbara's argument by stating Barbara is claiming that "she was never was required" to file a proceeding against the Children. Children's Brief at 19. Barbara instead argued that the motion she did file was a proceeding against the Children. Barbara's Brief at 13-17. With that false predicate, the Children argue any motion that Barbara might file now would be time barred. Children's Brief at 24-25. That assertion is actually false. The reasons given by the trial court and the Children for denying Barbara's *pending* motion are not substantive. Thus, if Barbara's motion were dismissed on procedural grounds, as an "independent proceeding" under Section 75-3-106, Barbara would have one year to re-file an independent proceeding for recovery of the homestead. Utah Code §78-12-40.

But Barbara is not seeking to file a new motion to recover the distributed property. The distribution occurred on May 29, 2003 (Trial Exh. 21), and Barbara filed her *timely* motion two months later on July 28, 2003. R.918-41; Utah Code §75-3-909, §75-3-1004,

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[13] Barbara's counsel faced this argument in a prior case. *See* Appellee's Brief in *Hughes v. Cafferty*, 89 P.3d 148, 495 Utah Adv. Rep. 5, 2004 UT 22 (Utah 2004). The Supreme Court did not need to reach this issue and so it provided no guidance. Even if a decision on this point is dicta, Barbara's counsel believes it would be helpful dicta for both the appellate courts and appellate counsel.

and §75-3-1006. On remand, the trial court denied Barbara's motion on the basis it was defective, not that it was untimely. It erroneously held that Barbara's motion was filed against the Estate, and not against the distributees. R.1755, ¶6; Barbara's Brief at 13-17. Barbara's motion prayed that the Children be ordered to return the homestead *to the estate.* Her action was for the benefit of the estate, not against it. As Barbara has previously explained, she followed the correct procedure. *Id.*

The trial court further held Barbara's motion was defective because she only identified herself as a creditor, and not as both a creditor and a devisee, ruling that identifying herself as a creditor did not provide "notice to the beneficiaries of her claim." R.1755, ¶6. The Children did not address this issue, although it would seem to be a necessary prerequisite to their claims that a new motion would be untimely. *See* Children's Brief at 18-29. In any event, Barbara has already addressed this issue in her Appellant's Brief. Barbara's Brief at 16-17.

D. The Trial Court Had *in Rem* Jurisdiction of the Homestead and *in Personam* Jurisdiction over the Children.

In her appellant's brief, Barbara has identified the probate code sections that permit "interested persons" to raise and contest matters in a probate proceeding by giving notice to other "interested persons." Barbara's Brief at 13-17. In the face of this analysis, the Children claim, based solely on their status as residents of Nevada, the trial court lacked *in personam* jurisdiction when it considered Barbara's motion for recovery of the distributed property. The Children are wrong on two counts. First, probate courts have "in rem"

jurisdiction of real property located in Utah. *Miller v. Walker Bank & Trust Company,* 17 Utah 2d 88, 89-90, 404 P.2d 675, 676 (Utah 1965); *accord* Uniform Probate Code §3-101 (General Comment; preceding section). Accordingly, the probate court had jurisdiction to order the title to the homestead returned to the estate. Without *in personam* jurisdiction the Court could quiet title in the estate if necessary. Thus, the trial court did not need *in personam* jurisdiction.

In any event, the trial court had *in personam* jurisdiction. Like all other jurisdictions, Utah courts gain *in personam* jurisdiction of any party that appears generally in any court proceeding. *See Barber v. Calder,* 522 P.2d 700, 702 (Utah 1974). In *Barber*, the Supreme Court found that the filing of an answer by nonresidents constituted a general appearance, noting "an appearance by the defendant for any purpose except . . . to object to jurisdiction . . . constitutes a general appearance." *Id.* at 702, Fn. 4. Having appeared generally, the Children voluntarily submitted themselves to the trial court's *in personam* jurisdiction. Thus, the Children remain subject to the *in personam* jurisdiction of the trial court and this Court.

Barbara asks the Court to order the homestead returned to the Estate.

THE CHILDREN'S CROSS APPEAL

V. THE COURT SHOULD DENY THE CHILDREN'S CROSS APPEAL FOR FAILURE TO MARSHAL THE FACTS AND ON THE MERITS.

The Children identify their cross appeal issue as "Did the trial court correctly calculate [the amount of Barbara's devise]" and their burden regarding the trial court's

findings as establishing "clear error" (Children's Brief at 2, Issue #2). They assert two arguments: the court failed to include a deduction in its computation; and the Court improperly calculated what assets were held at death.[14] They did not marshal the facts and demonstrate that those facts "cannot possibly support the conclusion reached by the trial court, even when viewed in the light most favorable to the appellee" *Wayment v. Howard*, ¶9, 144 P.3d 1147, 561 Utah Adv. Rep. 37, 2006 UT 56 (Utah 2006). Nor did they follow the procedure outlined in *Chen v. Stewart* even though they cited it regarding their burden on appeal. *Chen v. Stewart*, ¶¶76-80, 100 P.3d 1177, 510 Utah Adv. Rep. 9, 2004 UT 82 (Utah 2004) (explaining in detail marshaling, its purpose, and what the court expects when a party marshals the facts). In addition, their Remand Brief did not include the allegedly missing item when the Children discussed offsets. Children's Remand Brief at 8, R. 1566. Thus, any claim that the findings of fact are factually incorrect should be denied.

When the Children address their cross appeal (Children's Brief at 16-18), they argue for the first time that the trial court did not follow the directions of the Court of Appeals because the POD accounts owned by Louis were not "held at death." Children's Brief at 16-18. Not only is this point raised for the first time on appeal, it is contrary to their Remand Brief. "POD accounts are . . . non-probate assets. . . . Ownership transferred upon Lou's death." Children's Remand Brief at 9; R. 1586, ¶1. Having conceded that

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[14] While it should not be relevant to this appeal, the Children falsely claim that Barbara received all of the tangible personal property listed on Trial Exh. 36. *Compare* Children's Brief at 12 *with* T. 101-105.

Louis held the assets at death, the Children may not now argue his ownership terminated "immediately before death." *See also* R. 1366-67, ¶21(trial court's initial finding Louis held eight accounts at death, including the POD accounts); *see also,* Trial Exhibit 2, Stipulation at 3-4, ¶ 9.

In any event, the Children's position is legally incorrect. In support of their argument, the Children cite Section 75-2-205, a probate code section that only applies to the elective share provisions. Utah Code §75-2-201 (definitions "as used in this part"); Utah Code Title 75, Chapter 2, Part 2 "Elective Share of Surviving Spouse."

The controlling statutory provisions are contained in Sections 75-6-101 through 115 "Multiple Party Accounts." Those sections specifically address the rights of parties and POD payees to "POD accounts". POD accounts are owned by the "party" or owner (Louis) until death. The POD payee only obtains ownership by proving the fact of the owner's death and the POD payee's identity. Utah Code §75-6-110. *See also* Utah Code §75-6-101 (7)(a), (7)(b), (9), (10), and (11). Section 75-6-104(1), cited by the Children addressing "joint accounts" not POD accounts, actually supports Barbara's point. Utah Code §75-6-104(1). A dispute between an estate and a surviving joint tenant cannot arise until the decedent has died. It does not arise "immediately before death."

For these reasons, the Court should not modify or reverse the trial court's calculation of damages.

CONCLUSION AND PRAYER FOR RELIEF

Intent on keeping their unjust enrichment, the Children rely on pejorative comments about Barbara in support of that goal. That should not be surprising to counsel or to the Court. But Barbara, friend of Louis for nearly 50 years, loving wife for over 23 years, now nearly eighty one years of age, does not understand why Louis' intended gift to her had to pass through this gauntlet of irrelevant, unexplained, false, and misleading statements of fact. Having not responded to each and every allegation as she would have liked to have done, Barbara asks the Court to render a fair and just decision based on the legal issues involved.

Accordingly, Barbara asks the Court to remedy seven years of injustice by:

1. Ordering the homestead to be reconveyed to the estate;

2. Ordering the homestead sold;

3. Ordering Barbara's life estate interest to be valued fairly, taking into account when the personal representative should have sold the life estate;

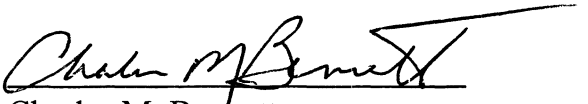
4. Ordering the net proceeds of sale distributed to Barbara for her life estate interest;

5. Holding that Barbara is a general pecuniary devisee, entitled to interest as directed by Section 75-3-904; and

6. Holding that the Children are residuary devisees whose devise abates to pay Barbara's general pecuniary devise pursuant to Section 75-3-902.

Dated this 12 day of March , 2007.

BLACKBURN & STOLL, LC



Charles M. Bennett
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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF** were mailed by first class to the following persons, this 12th day of March, 2007:

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